



## Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact [support@jstor.org](mailto:support@jstor.org).

## THE SIGNIFICANCE OF THE HAY-PAUNCEFOTE CONVENTION.

THE true aspect of the Hay-Pauncefote convention is only apparent as one studies the history of the isthmian discussions and negotiations in the United States. The policy of our government since the administration of John Quincy Adams, the precise terms of the Clayton-Bulwer treaty, as well as certain principles of the Law of Nations, must be examined with care. Comment lacking such a foundation is necessarily unintelligent and misleading. Much of such comment has recently found its way into print.

Henry Clay, referring to an interoceanic canal in his instructions to the Commissioners of the Panama Congress of 1826, said:—

“If the work should ever be executed so as to admit of the passage of sea-vessels from ocean to ocean, the benefits of it ought not to be exclusively appropriated to any one nation, but should be extended to all parts of the globe upon the payment of a just compensation or reasonable tolls.”

The Senate in 1835 requested President Jackson to negotiate treaties with the Central American governments in order to protect such persons as should undertake to construct an isthmian waterway, and to arrange for “the free and equal navigation of the canal by all nations.” Congress adopted similar resolutions in 1836. On the 12th of December, 1846, a treaty was concluded between the United States and New Grenada, by the terms of which the former country guaranteed “positively and efficaciously the perfect neutrality of the before-mentioned isthmus.” In 1849 Mr. Hise, *chargé d'affaires* of the United States in Central America, without the authority of his government concluded a treaty with Nicaragua. In the articles agreed upon there was secured for the United States exclusive jurisdiction over any isthmian route through that country. This treaty was unsatisfactory to the President, and so was never submitted to the Senate for ratification.

In the mean time England had acquired a lodgment in Central

America. She exercised dominion over the Mosquito Indians, occupying the country at the mouth of the San Juan River, the eastern terminus of the projected canal. At the north there was the settlement of British Honduras, and the Bay Islands in the Bay of Honduras were also claimed. The United States looked upon these encroachments with alarm and distrust. In 1849 Mr. W. C. Rives was sent to Paris, where he had an interview with Lord Palmerston with reference to the British claims. In his instructions, Mr. Clayton, then Secretary of State, said:—

“That the United States sought no exclusive privilege or preferential right of any kind in regard to the proposed communication . . . that the United States would not, if they could, obtain any exclusive right or privilege in a great highway which naturally belonged to all mankind, for they well knew that the possession of any such privilege would expose them to inevitable jealousies, and probable controversies, which would make it infinitely more costly than advantageous; that while they aimed at no exclusive privilege for themselves they could never consent to see so important a communication fall under the exclusive control of any other great commercial power.”

These utterances indicate clearly the policy of the United States prior to 1850. Our government was glad to join hands with Great Britain. We sought no exclusive control; yet exclusive European domination was not to be tolerated. Neutralization remained our fixed policy. Great Britain agreed. The result was the Clayton-Bulwer treaty.

The great purpose of that treaty was to establish the neutralization of the projected waterway. To accomplish such an end it was necessary to make some important preliminary stipulations. The text of the treaty is the best statement of what was agreed upon. In Article 1:—

“The governments of the United States and Great Britain hereby declare that neither the one nor the other will ever obtain or maintain for itself any exclusive control over the said ship canal; agreeing that neither will ever erect or maintain any fortifications commanding the same, or in the vicinity thereof, or occupy, or fortify, or colonize, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America.”

All of these stipulations were necessary. Neutralization of the canal prohibited exclusive control by either nation; it required the abandonment by England of her dominion over the Mosquito Indians, as well as her claims over the Bay Islands. It prohibited

the United States equally from colonizing in Central America. Fortifications along the canal it absolutely forbade. The fundamental idea expressed by the term "neutralization" prohibited cannon and ordnance. "Neutralized states, persons, and things," writes Professor T. J. Lawrence, "occupy exactly the same position towards hostilities actually in progress as neutral states, persons, and things; but they differ from the latter in that they are bound by international agreement to take no part in warlike acts, and are protected from warlike operations as long as they respect this obligation."<sup>1</sup> A "neutralized" canal is one which by the consent of nations is set apart from the seat of hostilities, naval and military. No fortifications frown upon its banks; no warships block its termini. It is impossible for two nations to insure the neutralization of an interoceanic canal by any agreement to which they are the sole parties. In view of this fact it was provided in the convention of 1850 that both the United States and Great Britain should endeavor to secure by treaty the acquiescence of other friendly powers, as well as that of the Central American governments. In this way the Clayton-Bulwer treaty was a *bona fide* though preliminary attempt on the part of the two states peculiarly interested to bring about the result desired. The intention of the negotiators was aptly expressed. In Article 8 it is stated that the contracting parties not only desired "to accomplish a particular object, but also to establish a general principle," and further, "that the canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other state which is willing to grant thereto such protection as the United States and Great Britain engage to afford."

Since its ratification the binding character of the Clayton-Bulwer treaty has been often questioned. Lack of space forbids a full discussion of the several controversies which have arisen. Temporary failure on the part of England to relinquish her territorial claims aroused the indignation of our government. The settlement of British Honduras was not intended by the negotiators to be within the scope of the treaty, and therefore the retention of that territory was not unreasonable. England's continued claims over the Bay Islands, as well as her dominion over the Mosquito Indians, were, however, without justification. Her later abandonment of these claims, and her compliance with the terms

---

<sup>1</sup> The Principles of International Law, by T. J. Lawrence, Boston, 1898, p. 486.

of the treaty, entirely satisfied our government, as was indicated by President Buchanan in his message of December, 1860. The Clayton-Bulwer treaty was recognized as binding upon the United States by Mr. Seward in 1866, by Mr. Fish in 1872, and by Mr. Evarts in 1880. So long as the policy of neutralization seemed advantageous, the validity of the treaty was hardly questioned.

It was the aggressiveness of the French Panama enterprise which called forth from Congress and from President Hayes declarations of a new and different policy, involving a different interpretation of the compact of 1850. In his message of March 8, 1880, the President said:—

“The policy of this country is a canal under American control. . . . It will be the great ocean thoroughfare between our Atlantic and our Pacific shores, and virtually a part of the coast line of the United States.”

President Garfield reiterated the same policy. These utterances gave rise to a prolonged controversy concerning the Clayton-Bulwer treaty, conducted on the American side by Mr. Blaine and Mr. Frelinghuysen, and rebutted by Lord Granville in behalf of Great Britain. Neutralization—the traditional policy of our government—was flung aside. In its place there was offered a unique substitute. In support of it the proposition was advanced that the Clayton-Bulwer treaty was a lapsed and voidable agreement; and, further, that circumstances had so changed since 1850 that the United States was no longer bound to observe the terms of its contract. Our secretaries found that they had to defend the difficult side of the case. The doctrine of American control had been launched with more zeal than discretion. However patriotic may have been the motives of its advocates, the policy itself had but little foundation in law or history.

The advantages of a neutralized canal, and also the binding character of the Clayton-Bulwer treaty, have since been reasserted. President Cleveland, in his annual message of December, 1885, vigorously emphasized the former. The latter was admitted by our own government as well as England in 1894, in communications relating to the Greytown disturbances, in which a British consul and British marines had played a prominent part. On February 5, 1900, Mr. Hay and Lord Pauncefote signed a convention which recognized the binding character of the articles agreed upon in 1850. Finally, in a report of the sub-committee of the Senate Committee on Foreign Relations, submitted March 9, 1900, the following reference was made to the Clayton-Bulwer treaty:—

"Since 1860 the Clayton-Bulwer treaty has been in some way recognized by the government in each of the succeeding administrations as a subsisting compact. Strong reasons for its abrogation have been frequently stated, and some have always denied its obligatory force, but no movement to accomplish that result has been made, either by Congress or the Executive."

Intelligent discussion of the merits of the Hay-Pauncefote convention is an impossibility without the decision of this preliminary question: whether or not the Clayton-Bulwer treaty is at the present time binding upon the parties thereto. If we yield to the consensus of opinion of almost all persons now familiar with the diplomatic history of the United States for the past seventy-five years, we must without hesitation answer the question affirmatively. The significance of the new treaty then becomes at once apparent. Whether the United States is gaining or losing by the new agreement is simply a matter to be ascertained by comparison of the two treaties. In Article 1 of the Hay-Pauncefote convention, the United States is given the right to construct an isthmian canal at any time under its own auspices, and to "enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal." The treaty of 1850 gave no such privileges. In Article 2 of the new agreement it is provided that the United States shall maintain a military police along the canal sufficient to insure its protection. The treaty of 1850 contains no similar stipulation. An adequate force might require the services of many men; and under the Clayton-Bulwer treaty, England might well claim the right to send British soldiers to the isthmus for the purpose of protecting the canal in common with the United States. The new treaty, removing the possibility of such a contingency, and with a delicate regard for American sentiment, intrusts the entire protection of the isthmian waterway to American hands. Thus it is clear that the Hay-Pauncefote convention contains concessions which are not found in the Clayton-Bulwer treaty. That these concessions are of value is not to be questioned.

In many respects the two treaties of 1850 and 1900 are alike. The principle of isthmian neutralization established in 1850 is reasserted in the compact of 1900. An arrangement for the application of that principle is set forth according to the plan adopted by the Constantinople convention of 1888 for the neutralization of the Suez Canal. In the second section of the first article of the Hay-Pauncefote convention it is stipulated that "the canal

shall never be blockaded, nor shall any right of war be exercised or any act of hostility be committed within it." The Senate committee's amendment, however, renders such a prohibition nugatory. It is there provided that the conditions and stipulations in sections 1, 2, 3, 4, and 5 shall not "apply to the measures which the United States may find it necessary to take for securing by its own forces the defence of the United States and the maintenance of public order." However vague the language used, the purpose of the amendment is clear. The attempt is made to give the United States, when at war, the right to hold the canal as a part of its coast line, to defend and blockade it as such, and, if necessary, make it the centre of hostilities. It is evident that the status of such a waterway would be wholly unlike that of a neutralized canal, and widely different from that agreed upon by Mr. Hay and Lord Pauncefote.

Criticism of a policy of neutralization must be aimed at the provisions of the Clayton-Bulwer treaty as well as against those of the convention of 1900. If it be assumed that the former is now binding on the United States, and yet detrimental to our national interests, and if England be unwilling to yield more than is conceded in the unamended convention of this year, how may the United States rightfully secure control over an isthmian canal? The only way by which such an end may be accomplished is by the offer of some consideration in exchange for the greater concessions desired. What Great Britain has relinquished in Central America during the past half century might be thought to be the measure of compensation. A sacrifice such as the relinquishment of certain of our territorial claims in Alaska might be required. It is not to be denied that the United States has the power to construct a canal across the isthmus, and that if it should undertake such a work, England for reasons of her own might long hesitate to interfere by force of arms. What the United States has the power to do in Central America, and what the United States has the right to do under its treaty stipulations, are not identical. International obligations imposed by treaty do not owe their existence solely to the strong arm by which they may be enforced. If our government is bound by the Clayton-Bulwer treaty not to construct and exclusively control an isthmian canal, it is bound simply because it has agreed not to do that very thing. The ratification of the terms of the compact, and not the physical strength of the nation, indicates the reality of the obligation.

Recognition of such a principle is of the essence of the Hay-

Pauncefote convention. Its great significance in American diplomacy lies not in its provisions for the neutralization of an inter-oceanic waterway, nor in the arrangements for the immediate construction of a canal under our own auspices, but rather in its acknowledgment that the basis for all Anglo-American negotiations in regard to isthmian affairs is the terms of the compact of 1850. Press reports indicate that this was willingly agreed to if not suggested by Mr. Hay. It may be urged that his advocacy of a plan of neutralization led him to such a course for reasons of policy rather than of necessity or duty. Whatever motives may have influenced the Secretary of State, the fact remains that the convention signed on the fifth of February shows that this government feels itself bound by its early agreement. Senatorial action cannot affect this. Whether that body reject the traditional policy of neutralization and attempt to realize visions of American control by the incorporation of the amendment suggested, or whether the British government be unwilling to acquiesce in the treaty thus modified, the work of Mr. Hay and Lord Pauncefote will remain. Of course no unratified convention can bind the United States. Nevertheless, an unratified convention may exercise great influence. That of February fifth is of such kind. It signifies to the American people, as well as to Congress, that legislative action with respect to an isthmian waterway, and yet without regard for the Clayton-Bulwer treaty, is improper if not unworthy of American statesmanship; it gives to England no small assurance that this government is proof against a popular yearning to seize an isthmian route and control it irrespective of British consent; finally, it is a declaration to other friendly states that the United States intends to observe its contracts, and that it regards a treaty, in a sense larger than that implied in the Constitution, as "the supreme law of the land."

*Charles Cheney Hyde.*